Version Buy Sdn Bhd v Thong Wee Kee & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-45–08 OF 2013(W)
RAUS SHARIF PCA, ABDULL HAMID EMBONG, AHMAD MAAROP, HASAN LAH AND ABU SAMAH FCJJ
8 OCTOBER 2014

Land Law — Caveats — Private caveat — Purchaser of lands terminated sale and purchase agreements with buyers on discovering application for entry of private caveat had been lodged for one of the lands — Land registry rejected application for failure of proposed caveator to show evidence of claim — No registration or endorsement of existence of private caveat made on register document of title — Whether mere fact official search showed application for entry of private caveat had been lodged at land registry did not mean there was 'actionable encumbrance' — Whether caveat only took effect and became encumbrance when it was endorsed/registered on register document of title

The question posed to the Federal Court in the instant appeal was whether the mere discovery that an application for entry of a private caveat had been lodged at the land registry, but not that it had been endorsed or registered on the register document of title, was sufficient to constitute an 'actionable encumbrance'. The appellant answered the question in the affirmative and urged the court to hold that its termination of three sale and purchase agreements ('the SPAs') with the respondents and another party ('the first defendant') was consequently valid. The appellant had simultaneously signed the SPAs to buy the respective lands ('the lands') of the respondents and the first defendant and had paid them the requisite deposits under the SPAs. Clause 2.1 of the SPAs provided, inter alia, that the transactions were subject to the lands being 'free from all encumbrances'. When the appellant did a search on the lands on or about 20 November 2008, ie about seven months after signing the SPAs, it discovered that a third party had lodged a private caveat on the first defendant's land. For that reason, the appellant took the position the SPAs had been fundamentally breached and it terminated the SPAs and sought the return of the deposits together with liquidated damages amounting to RM1.7m. Even before the appellant filed its claim against the respondents and the first defendant in the High Court, the respondents had informed the appellant that a search done on the first defendant's property on 24 November 2008 showed that there was no private caveat on the land; that although an application for entry of one was lodged, it was rejected by the land registry for failure of the application to comply with statutory prerequisites; hence the first defendant's property was never encumbered. The respondents applied to strike out the appellant's suit but the High Court dismissed it on the ground the question

whether a valid private caveat existed at the material time and whether the appellant was justified in terminating the SPAs were triable issues. The Court of Appeal reversed that decision on appeal with the result the appellant's claim against the respondents was struck out. In the instant appeal, the appellant argued that under the National Land Code ('the NLC') a private caveat took effect from the time the land registry received the application and not from the time the caveat was eventually registered and that because the registrar of land titles had to register the caveat so long as the requisite forms were in order, the application for entry of caveat in the instant case crystallised into an 'actionable encumbrance' immediately upon its receipt by the land registry. The respondents, on the contrary, argued that a private caveat only took effect and became an encumbrance upon its registration or endorsement on the register document of title as prior to the happening of that event the registrar had power under the NLC to reject or suspend any instrument not fit for registration.

Held, dismissing the appeal with costs:

(1) No private caveat was entered or endorsed on the register document of title of the first defendant's property pursuant to s 324(2) of the NLC. Although the alleged caveator's application for entry of private caveat was received by the registrar on 11 November 2008, it was subsequently rejected. As such, there was no private caveat that bound the first defendant's property (see para 20).

(2) The word 'encumbrances' in cl 2.1 of the SPAs, in relation to the private caveat, had to be read in the context of s 322 of the NLC. It referred to some impediment in the registered title of the first defendant's property which prevented the registration of transfer of title from the first defendant to the appellant. Under the NLC, a caveat meant a 'registered caveat' (s 5 of the NLC). Thus, without the requisite registration, there was no 'encumbrance' on the first defendant's property (see para 24).

(3) It was clear that under s 324 of the NLC a private caveat became effective only after the requirements under s 324(2) had been complied with. Under s 324(2)(c) the entry of a caveat dated from the time the application for its entry was received and not from the time the endorsement was made on the register document of title. Only a private caveat that had been entered by the registrar on the register document of title had the effect specified in s 322(2) and (3) of the NLC, namely, to prohibit the registration, endorsement or entry on the register document of title of any instrument of dealing and any certificate of sale and etc (see paras 19 and 21).

(4) Pursuant to s 324 of the NLC when the registrar received an application for entry of private caveat he exercised a purely administrative function. But in exercising that function, the registrar had to see that the

application complied with s 323 of the NLC. If it complied, the registrar must enter the caveat on the register but if it did not, he had the power to reject the application (see para 23).

(5) In law, a party had to await the actual endorsement/registration of a private caveat by the appropriate land registry before it could act on an official search that disclosed the fact an application for entry of private caveat had been lodged. Just because the search disclosed the application had been lodged and received at the registry in accordance with s 324(1) of the NLC did not mean there was an actionable encumbrance (see para 13).

[Bahasa Malaysia summary

Persoalan yang dikemukakan kepada Mahkamah Persekutuan dalam rayuan ini adalah sama ada penemuan semata-mata bahawa permohonan untuk kemasukan kaveat persendirian telah dimasukkan di Pejabat Pendaftaran Tanah, tetapi bukan kerana ia telah diendors atau didaftarkan atas daftar dokumen hakmilik, adalah mencukupi untuk menjadi satu 'actionable encumbrance'. Perayu telah menjawab soalan secara positif dan mendesak mahkamah memutuskan bahawa penamatannya untuk ketiga-tiga perjanjian jual beli ('PJB tersebut') dengan responden dan pihak lain ('defendan pertama') adalah oleh demikian sah. Perayu telah menandatangani PJB tersebut serentak untuk membeli tanah masing-masing ('tanah tersebut') daripada responden-responden dan defendan pertama dan telah membayar mereka deposit yang dikehendaki di bawah PJB tersebut. Fasal 2.1 PJB tersebut memperuntukkan, antara lain, bahawa transaksi-transaksi itu tertakluk kepada tanah tersebut menjadi 'free from all encumbrances'. Apabila perayu membuat carian ke atas tanah tersebut pada atau sekitar 20 November 2008, iaitu lebih kurang tujuh bulan selepas menandatangani PJB tersebut, dia mendapati bahawa pihak ketiga telah memasukkan kaveat persendirian ke atas tanah defendan pertama. Untuk sebab itu, perayu telah mengambil kedudukan PJB tersebut telah dilanggari pada asasnya dan ia telah menamatkan PJB tersebut dan memohon deposit-deposit dikembalikan bersama ganti rugi jumlah tertentu sebanyak RM1.7 juta. Malah sebelum perayu memfailkan tuntutannya terhadap responden-responden dan defendan pertama di Mahkamah Tinggi, responden-responden telah memberitahu perayu bahawa satu carian yang telah dilakukan ke atas hartanah defendan pertama pada 24 November 2008 menunjukkan bahawa tiada kaveat persendirian atas tanah tersebut; bahawa meskipun permohonan untuk kemasukan kaveat dibuat, ia telah ditolak oleh Pejabat Pendaftaran Tanah kerana kegagalan permohonan itu mematuhi prasyarat statutori; justeru hartanah defendan pertama tidak disekat. Responden-responden telah memohon untuk membatalkan guaman perayu tetapi Mahkamah Tinggi menolaknya atas alasan berhubung persoalan sama ada satu kaveat persendirian sah wujud pada masa material dan sama ada perayu wajar menamatkan PJB tersebut adalah isu-isu yang boleh dibicarakan.

Mahkamah Rayuan telah mengakas keputusan tersebut dengan keputusan tuntutan perayu terhadap responden-responden dibatalkan. Dalam rayuan ini, perayu berhujah bahawa di bawah Kanun Tanah Negara ('KTN') suatu kaveat persendirian bermula kuat kuasa dari masa Pejabat Pendaftaran Tanah menerima permohonan itu dan bukan dari masa kaveat itu akhirnya didaftarkan dan bahawa kerana Pendaftar Hakmilik Tanah perlu mendaftar keveat selagi borang yang diperlukan adalah teratur, permohonan untuk kemasukan kaveat dalam kes ini diperjelaskan dalam 'actionable encumbrances' dengan segera sejurus penerimaannya oleh Pejabat Pendaftaran Tanah. Responden-responden, sebaliknya, berhujah bahawa kaveat persendirian hanya berkuat kuasa dan menjadi sekatan selepas pendaftaran dan pengendorsannya atas daftar dokumen hakmilik kerana sebelum kejadian itu berlaku pendaftar mempunyai kuasa di bawah KTN untuk menolak atau menggantung apa-apa surat cara yang tidak sesuai untuk pendaftaran.

Diputuskan, menolak rayuan dengan kos:

(1) Tiada kaveat persendirian telah dimasuki atau diendorskan atas daftar dokumen hakmilik hartanah defendan pertama menurut s 324(2) KTN. Walaupun permohonan pengkaveat dikatakan untuk kemasukan kaveat persendirian telah diterima oleh pendaftar pada 11 November 2008, ia akhirnya ditolak. Oleh itu, tiada kaveat persendirian yang mengikat hartanah defendan pertama (lihat perenggan 20).

(2) Perkataan 'encumbrances' dalam fasa 2.1 PJB tersebut, berkenaan kaveat persendirian, hendaklah dibaca dalam konteks s 322 KTN. Ia merujuk kepada beberapa halangan dalam hakmilik berdaftar hartanah defendan pertama yang menghalang pendaftaran pemindahan hakmilik daripada defendan pertama kepada perayu. Di bawah KTN, kaveat bermaksud 'registered caveat' (s 5 KTN). Oleh itu, tanpa pendaftaran yang diperlukan, tiada 'encumbrance' atas hartanah defendan pertama (lihat perenggan 24).

(3) Adalah jelas bahawa di bawah s 324 KTN, kaveat persendirian mula berkuat kuasa hanya selepas keperluan di bawah s 324(2) telah dipatuhi. Di bawah s 324(2)(c), kemasukan kaveat bertarikh dari masa permohonan untuk kemasukannya diterima dan bukan dari masa pengendorsan dibuat atas daftar dokumen hakmilik. Hanya kaveat persendirian yang telah dimasuki oleh pendaftar atas daftar dokumen hakmilik mempunyai kesan yang ditetapkan dalam s 322(2) dan (3) KTN, iaitu, untuk menghalang pendaftaran, pengendorsan atau kemasukan atas daftar dokumen hakmilik apa-apa surat cara urusan dan apa-apa sijil jualan dan lain-lain (lihat perenggan 19 and 21).

(4) Menurut s 324 KTN apabila pendaftar menerima permohonan untuk kemasukan kaveat persendirian dia melaksanakan fungsi pentadbiran semata-mata. Namun dalam melaksanakan fungsi tersebut, pendaftar

perlu melihat bahawa permohonan itu mematuhi s 323 KTN. Jika ia mematuhi, pendaftar perlu memasukkan kaveat atas daftar tetapi jika tidak, dia mempunyai kuasa untuk menolak permohonan itu (lihat perenggan 23).

(5) Dalam undang-undang, satu pihak perlu menunggu pengendorsan/pendaftaran sebenar kaveat persendirian oleh Pejabat Pendaftaran Tanah yang berkenaan sebelum ia boleh bertindak atas carian rasmi yang menunjukkan fakta bahawa permohonan untuk kemasukan kaveat persendirian telah dimasukkan. Hanya kerana carian itu menunjukkan permohonan itu telah dibuat dan diterima di Pejabat Pendaftaran menurut s 324(1) KTN tidak bermaksud terdapat sekatan yang boleh diambil tindakan (lihat perenggan 13).]

Notes

For cases on private caveat, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2577–2578.

Cases referred to

AKB Airconditioning & Electrical Sdn Bhd v Hew Foo Onn & Anor [2002] 5 MLJ 391, HC (refd)

Chng Sin Poey & Sons Sdn Bhd v Quek Lian Meng [1979] 1 MLJ 98 (refd)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (refd)

Lee Chin Cheng Dengkil Oil Palm v Kaplands Sdn Bhd [2003] 1 MLJ 177; [2002] 4 CLJ 753, CA (refd)

Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd [2000] 2 MLJ 456; [2000] 2 CLJ 236, CA (refd)

Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn Bhd (formerly known as Kredin Sdn Bhd) v Anafartal Caddesi Sdn Bhd [2006] 4 MLJ 1; [2006] 2 CLJ 757, HC (refd)

Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224, FC (refd)

Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44, PC (refd)

T Damodaran v Choe Kuan Him [1979] 2 MLJ 267b; [1979] 1 LNS 107, PC (refd)

Legislation referred to

National Land Code ss 5, 298, 322, 322(2), (3), 323, 323(1), 324, 324(1), (2), 2(c), (3), Forms 19A, 19B

Rules of the High Court 1980 O 18 rr 19(1)(b), (1)(c), (d)

Appeal from: Civil Appeal No W-02(IM)-717–03 of 2012 (Court of Appeal, Putrajaya)

C Sri Kumar (Intan Azlina Mazlan with him) (Kumar Partnership) for the appellant.
Bastian Vendargon (Jananee Gopal with him) (Chellam Wong) for the respondents.

Hasan Lah FCJ (delivering judgment of the court):

[1] Leave was granted on 16 July 2013 to the appellant to appeal against the decision of the Court of Appeal given on 2 August 2012 on the following questions of law:

(a) whether a private caveat that had been properly lodged and received at the appropriate land registry in accordance with s 324(1) of the National Land Code and which is recognised and disclosed in an official search constitutes an actionable encumbrance ('Question 1'); and

(b) whether in law a party is required to await the actual endorsement/registration of a private caveat by the appropriate land registry before acting on an official search that discloses the lodgment of a private caveat to protect its/his interest ('Question 2').

[2] The appellant was the plaintiff in the High Court and the respondents were the second and third defendants respectively.

[3] The appellant filed an action in the High Court against the respondents and another defendant, the late Hjh Saleha bt Mohamed Ali (the first defendant named in the High Court suit), for a purported breach of three sale and purchase agreements executed simultaneously on 18 April 2008.

[4] On 2 November 2011, the respondents filed an application to strike out the appellant's claim pursuant to O 18 rr 19(1)(b), (c) and/or (d) of the Rules of the High Court 1980 premised on the respondents' assertion that the terminations of the three sale and purchase agreements were without justification. The said application was dismissed on 27 February 2012 by the learned High Court judge on the ground that the action was not one which was obviously unsustainable. The respondents then appealed to the Court of Appeal against the decision of the High Court. The respondents' appeal was allowed with costs on 2 August 2012.

[5] The relevant facts of the case are these. The first and second respondents and the first defendant were all individuals and registered owners of particular parcels of land ('the properties'). The details are as follows:

(a) the first defendant was the administrator of the parcel of land known as PN 21364, Lot 525, Town and District of Kuala Lumpur;

(b) the first respondent was the registered owner of the parcel of land known as PN 13348, Lot 466, Seksyen 19, Town and District of Kuala Lumpur; and

(c) the second respondent was the registered owner of the parcel of land known as PN 22055, Lot 526, Town and District of Kuala Lumpur.

[6] On 18 April 2008 the appellant executed three sale and purchase agreements simultaneously with the respondents and the first defendant for the sale and purchase of the properties. Pursuant to the agreements, the appellant paid the deposit of RM521,840 to the first defendant, RM583,400 to the first respondent and RM590,280 to the second respondent respectively.

[7] Clause 2.1 of the sale and purchase agreements provided, inter alia, that '... the Vendor hereby agrees to sell and the Purchaser hereby agrees to purchase the Property free from all encumbrances ... subject to the terms and conditions herein after contained and subject to the Purchaser entering into the Sale and Purchase Agreements for the purchase of the Remaining Properties. The completion of the purchase of this Property and the Remaining Properties shall be carried out simultaneously ...'.

[8] On or about 20 November 2008, pursuant to a land search that was conducted on the properties, the appellant discovered that a private caveat had been lodged by one Abu Mansor bin Khalid on the first defendant's property on 11 November 2008 vide Presentation No 18804/2004. On 21 November 2008, the appellant's solicitors wrote a letter to Messrs Leong Yeng Kit, who represented the respondents as vendors in the sale and purchase agreements, informing of purported private caveat lodged on 11 November 2008 over the property belonging to the first defendant ie Lot 525. Based on that the appellant contended that the respondents had breached the sale and purchase agreements. The appellant took the position that this was a fundamental breach of the sale and purchase agreements as the properties were to be free of all encumbrances. As a result, the appellant elected to terminate the agreements and sought the recovery of the deposits together with further liquidated damages in the sum of RM1,696,520.

[9] By letter dated 25 November 2008 the respondents' solicitor wrote and stated that a land search had been conducted on the first defendant's property on 24 November 2008 which showed that the private caveat had ceased to exist. The respondents therefore took the position that the first defendant's property was unencumbered because although the private caveat was lodged, it was not registered as it had been rejected by the registrar.

[10] The learned trial judge, in refusing to strike out the appellant's claim,

held that the issues of whether there was at the material time a private caveat lodged against the first defendant's property and whether the appellant was justified in electing to terminate the sale and purchase agreements were triable issues. As stated earlier that decision was reversed by the Court of Appeal and in the result the appellant's claim against both the respondents was struck out. Unfortunately we did not have the benefit of the ground of judgment of the Court of Appeal which reversed that decision.

[11] Learned counsel for the appellant submitted that Question 1 ought to be answered in the affirmative for the following reasons. Firstly, s 324(1) and 324(2) of the National Land Code ('the NLC') clearly establish that a private caveat takes effect at the time the application for the entry of the private caveat was received by the land registry and not upon the eventual registration thereof. In support of that contention learned counsel cited the cases of *AKB Airconditioning & Electrical Sdn Bhd v Hew Foo Onn & Anor* [2002] 5 MLJ 391; and *Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn Bhd (formerly known as Kredin Sdn Bhd) v Anafartal Caddesi Sdn Bhd* [2006] 4 MLJ 1; [2006] 2 CLJ 757.

[12] Secondly, the mechanism of registration of private caveat in Malaysia pursuant to the NLC is relatively straightforward. So long as the requisite forms (Form 19B) are in order, the registrar has no discretion in the matter but must register the private caveat that is applied for. It is not the duty of the registrar to inquire into whether the application for the entry of the private caveat is validly made. In support of that proposition learned counsel cited the cases of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212; and *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224. It was therefore submitted that the private caveat in respect of Lot 525 was effective and was in place on 11 November 2008 and the question of its removal or rejection did not arise. The private caveat lodged against the first defendant's property on 11 November 2008 crystallised into an encumbrance on the first defendant's property immediately thereafter.

[13] With regard to Question 2, learned counsel for the appellant submitted that the question ought to be answered in the affirmative because a caveat is entered/endorsed onto the title merely to protect someone's interest and to act as a statutory injunction. It is not 'registered' to create an interest or enlarge a pre-existing interest. A private caveat which had been properly lodged in accordance with s 324(1) of the NLC and which is recognised and disclosed in an official search becomes an actionable encumbrance at the time of receipt of the application.

[14] Learned counsel for the respondents, on the other hand, submitted that only a registered private caveat would be tantamount to an encumbrance

within the meaning of a covenant against encumbrances. In support of that proposition learned counsel cited the following cases:

(a) *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267b; [1979] 1 LNS 107;

(b) *Lee Chin Cheng Dengkil Oil Palm v Kaplands Sdn Bhd* [2003] 1 MLJ 177; [2002] 4 CLJ 753; and

(c) *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 MLJ 456; [2000] 2 CLJ 236.

[15] Learned counsel for the respondents contended that under s 324 of the NLC a private caveat does not take effect at the time of its lodgment but upon its endorsement on the register document of title. Learned counsel for the respondents agreed with the appellant's submission that so long as the requisite forms are in order, the registrar has no discretion in the matter but must register the private caveat that is applied for. However, learned counsel for the respondents contended that under s 298 of the NLC the registrar is given the power to reject or suspend any instrument not fit for registration.

[16] In the instant case the alleged caveator submitted Form 19B together with a sworn statement by way of a statutory declaration in support of the same based on the fact that he claimed to be the stepson of the late husband of the late first defendant and was entitled to 1/4 share in the property according to a purported agreement. The alleged caveator however failed to furnish evidence to the Wilayah Land Office of the purported agreement. It was submitted by learned counsel for the respondents that the alleged caveator in the present case did not even satisfy the prerequisite of s 323 of the NLC. As such, the registrar had rightly rejected the purported lodgment by the alleged caveator as the registrar was empowered to do so and that the property was never encumbered.

[17] Section 324 of the NLC provides:

> (1) the Registrar shall note on any application under section 323 the time at which it was received (being, in the case of any application sent by post, the time at which it was withdrawn from its cover in the Registry or, as the case may be, Land Office) and, subject to subsection (2) of section 329, shall as soon as may be thereafter (and without being concerned to enquire into the validity of the claim on which it is based) give effect thereto by entering the caveat applied for in the manner provided by subsection (2);
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> (2) the entry of any private caveat shall be effected by the endorsement on the register document of title, under the hand and seal of the Registrar, of the words 'Private Caveat', together with a statement specifying —
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> (a) whether the caveat binds the land itself or an undivided share in the land, or a particular interest therein only;

(b) the person or body on whose application it was entered;

(c) the time from which it is effective (being the time of receipt of the application, as noted thereon pursuant to of subsection (1)); and

(d) the reference under which the application is filed.

(3) As soon as may be after the entry of any such caveat, the Registrar shall serve a notification in Form 19A upon the proprietor of the land or an undivided share in the land bound thereby or, in the case of a caveat binding a particular interest only, upon the person or body in whom that interest is for the time being vested.

[18] Under s 324(1) of the NLC it is provided that the registrar shall, without being concerned to enquire into the validity of the claim under s 323(1) is based, give effect to the application for the private caveat by entering the caveat applied for in the manner provided under sub-s (2). Under sub-s (2) it is provided that the entry of any private caveat shall be effected by the endorsement on the register document of title by the registrar the words 'private caveat', together with a statement specifying the four matters stated thereunder. One of the matters is the time from which it is effective which is the time of receipt of the application for entry of the private caveat. Under sub-s (3) the registrar is then required to serve a notification in Form 19A upon the proprietor of the land or an undivided share in the land.

[19] It is clear that under s 324 of the NLC a private caveat would become effective only after the requirements under sub-s (2) of s 324 of the NLC have been complied with. However, pursuant to sub-s 2(c) priority for entry of the caveat dates from the time of receipt of the application and not from the time the endorsement is made on the register document of title. In other words, once the registrar complied with the requirements of sub-s (2) the private caveat would have the effect as specified in sub-s (2) or (3) of s 322 of the NLC.

[20] In the instant case the said private caveat was received by the registrar on 11 November 2008 vide Presentation No 18804/2008. However, that caveat was rejected by the registrar subsequently. As such, no private caveat had been entered or endorsed on the register document of title of the first defendant's property pursuant to s 324(2) of the NLC. There was therefore no private caveat that bound the first defendant's property in respect of the application for entry of the private caveat lodged by the alleged caveator.

[21] It is pertinent to note that under s 322 of the NLC only a private caveat that had been entered by the registrar on the register document of title would have the effect specified in sub-s (2) or (3) of that section, namely to prohibit the registration, endorsement or entry on the register document of title of the land:

(a) any instrument of dealing and any certificate of sale;

(b) any claim to the benefit of any tenancy exempt from registration; and

(c) any lien-holder's caveat.

In short, the effect of such a private caveat is to freeze the register at least until the caveat is removed (*Lee Chin Cheng Dengkil Oil Palm v Kaplands Sdn Bhd*).

[22] In *Mewah Plus Property Sdn Bhd*, the agreement dated 11 July 1994 provided that the respondent ('the vendor') would undertake to remove any 'encumbrances' over the property and the appellant ('the purchaser') was entitled to vacant possession thereof. Subsequently, the appellant discovered that the property had been encroached upon by the respondent's neighbour. The appellant refused to pay the balance purchase price contending that the encroachment had impeded the completion of the sale. The trial judge ruled that the encroachment was no impediment to completion of the sale, that there was no breach of the agreement by the respondent, and that the respondent had therefore given vacant possession of the property. On appeal, the Court of Appeal held that the word 'encumbrance' in the agreement referred to some impediment in the registered title to the said property which prevents the registration of title from the respondent to the appellant. 'Encumbrances' in the context of the agreement means an encumbrance in the NLC. At p 241 of the judgment, the Court of Appeal had this to say:

> With due respect to counsel for the appellant, we are unable to agree with his argument. In our judgment, the work 'encumbrances' in the two clauses already quoted refers to some impediment in the registered title to the said property which prevents the registration of title from the respondent to the appellant. As was pointed out to counsel during argument, 'encumbrances' in the context of the agreement in question means an encumbrance in the National Land Code sense. As to what amounts to an encumbrance in the context of the National Land Code, reference may be usefully made to two decisions of the Privy Council on the point.
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> The first is *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267b, where Lord Diplock when delivering the advice of the board said (at p 269):
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> > In the National Land Code it is s 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an ultra vires acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. If registered they would amount to encumbrances within the meaning of a covenant against encumbrances; but unless registered they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be untitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as

> encumbrances on a registered title. Instead they are protected by the system of private caveat which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered proprietor so long as the caveat remains in force; that is, until it is removed from the register. The way in which this system of protection operates was dealt with by Their Lordships in the recent case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, to which reference may conveniently be made.

> The second is *Letchumanan Chettiar v Palaniappa Chettiar* [1983] 1 MLJ 6, where (at p 9) Lord Templeman referred to a caveat upon the register as 'the only relevant encumbrance', thereby rendering a wider meaning to that expression than that given it by Lord Diplock in *T Damodaran v Choe Kuan Him*.

[23] Section 324(1) of the NLC, inter alia, provides that the registrar is not supposed to enquire into the validity of the alleged caveator's claim that he had a registrable interest on the land as stated in Form 19B. In other words when the registrar receives the application he exercises a purely administrative function (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212; *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44). However, in exercising his administrative function the registrar has to see that the application for entry of a private caveat is in compliance with the requirement under s 323 of the NLC. The registrar therefore has the power to reject administratively any applications for entry of private caveats which do not comply with s 323 of the NLC. If the application complies with s 323 of the NLC the registrar must enter the caveat on the register. In *Chng Sin Poey & Sons Sdn Bhd v Quek Lian Meng* [1979] 1 MLJ 98 at p 100 Syed Othman J opined:

> ... It must be said of this application that although under s 324(1) of the Code the registrar is not required to enquire into the validity of the claim this does not mean that he cannot reject an application for entry of a caveat when it does not comply with the substance of the form, or, as in this case, when the application does not specify whether caveat is to bind the land itself or a particular interest ...

[24] In our view the word 'encumbrances' in cl 2.1 of the agreements must, in relation to the private caveat, be read in the context of s 322 of the NLC. It refers to some impediment in the registered title to the first defendant's property which prevents the registration of title from the first defendant to the appellant. Under the NLC, a caveat means a 'registered caveat' (s 5 of the NLC). Thus, without the requisite registration, there was no encumbrance on the first defendant's property.

[25] For the reasons given our answer to the first the question posed in this appeal is in the negative and the answer to the second question posed is in the affirmative. Accordingly the appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Ashok Kumar